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No. 91-794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HENRY HARPER, *et al.*,
Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.

PARTIES TO THE PROCEEDING

Petitioners are 420 civil service and Armed Forces retirees (predominantly members of the Virginia Federation of Chapters of the National Association of Retired Federal Employees and the Military Retirees Taxpayers Association) who have paid state income tax on their federal annuities to the Commonwealth of Virginia. A list of individual petitioners appears at Pet. App. E. at 22a.

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OPINIONS BELOW

The opinion of the Supreme Court of Virginia (Pet. App. A at 1a-5a) is reported at 410 S.E.2d 629. This Court's order remanding this matter to the Supreme Court of Virginia (No. 90-1685, June 20, 1991, Pet. App. B at 6a) is reported at 111 S.Ct. 2883. The prior decision of the Supreme Court of Virginia (Pet. App. C at 7a-17a) is reported at 401 S.E.2d 868. The decision of the trial court, the Circuit Court for the City of Alexandria (Pet. App. D at 18a-12a) is unpublished.

JURISDICTION

The Supreme Court of Virginia issued its opinion on remand from this Court affirming its denial of petitioners' entitlement to tax refunds on November 8, 1991. The petition for certiorari was filed on November 15, 1991 and granted on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

In *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court held that 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity, as derived from the Supremacy Clause, prohibit states from taxing federal annuitants more harshly than state annuitants. The Commonwealth of Virginia, like Michigan and twenty-one other states, exempted from state income taxation annuities of retired state and local employees while taxing annuities of retired federal employees. *See* Va. Code § 58.1-322(c)(3) (1984). Petitioners are retired federal employees, both civil service and military, who paid Virginia state income tax on their federal annuities.

Following this Court's decision in *Davis*, petitioners filed tax refund actions in various circuit courts in Virginia. These actions were consolidated before the Circuit Court for the City of Alexandria. Refunds were claimed for tax years 1985, 1986, 1987 and 1988.

The procedural framework in Virginia for a refund action is straightforward. Under state law, taxpayers are entitled to seek refunds of taxes that have been "erroneously or improperly assessed." Code of Virginia § 58.1-1826 (1985). Applications for refunds must generally be made within three years of the assessment. Code of Virginia § 58.1-1825 (1985). However, Virginia en acted a special statute of limitations to govern claims for *Davis*-type refund claims: applications for refund of post-1985 taxes may be made up to one year from the date of the final judicial resolution of whether Virginia must refund these taxes. Va. Code § 58.1-1823(B). Virginia law contains no "protest" requirement as a prerequisite for tax refund claims. *See* Va. Code § 58.1-1826.

The Circuit Court for the City of Alexandria denied petitioners' refund claims based upon its view that this Court's decision in *Davis* was to be applied prospectively-only pursuant to the *Chevron* analysis.[1] Pet. App. D at

20a. Petitioners appealed to Virginia's Supreme Court, which affirmed the trial court's analysis and holding. Pet. App. C at 17a.

In *Harper v. Virginia Department of Taxation*, 111 S.Ct. 2883 (1991), this Court vacated and remanded the decision of the court below, which denied petitioners tax refunds upon prospective-only application of *Davis*. The Court directed that the Virginia Supreme Court reconsider its decision in light of *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991). After reconsideration in light of *Beam*, the court below affirmed its prior decision in all respects. This Court granted the petition for certiorari on May 18, 1992.

SUMMARY OF THE ARGUMENT

In *Davis v. Michigan Department of Treasury*, 489 U.S. 803, this Court applied the unambiguous language of 4 U.S.C. § 111 and settled notions of intergovernmental tax immunity to invalidate Michigan's discriminatory taxation of federal annuities. When petitioners' case first came before the court below, that court relied on *Chevron Oil Co. v. Huson*, 404 U.S. 97, to conclude that *Davis* did not apply retroactively. This Court vacated and remanded that decision for further consideration in light of *Beam*; on remand the court below reaffirmed its *Chevron* analysis, concluding that *Beam* was inapposite. In both respects the court below erred.

1. The ruling in *Beam* is straightforward: if this Court applies the rule of law announced in a case to the parties before it, as a matter of equality and *stare decisis* that ruling must be applied by all other courts. There can be no real dispute that *Davis* was so applied: as a result of this Court's ruling, Mr. Davis received a refund. Nonetheless, the court below held that it need not apply *Davis*—it reasoned that because Michigan conceded that a refund was the proper remedy for the in-

validation of its tax, this Court's determination to apply its ruling to the parties before it was not "precedent." In so holding, however, the court below plainly erred: it matters not how or why this Court determined to apply its ruling in *Davis*. It matters only that it did. Under *Beam*, the court below was compelled to apply *Davis*; because it failed to do so, the decision below must be reversed.

2. The decision below is unsustainable for a second and even more fundamental reason. In enacting the Public Salary Tax Act of 1939 (4 U.S.C. § 111), Congress prohibited precisely the kind of discriminatory taxation imposed by the Virginia Department of Taxation ("Department of Taxation"). Under the guise of applying *Davis* nonretroactively, the court below essentially held that 4 U.S.C. § 111 did not become effective in Virginia until 1989, fifty years after it became the supreme law of the land. The Department of Taxation now asks this Court to join the court below in pretending that Congress had enacted 4 U.S.C. § 111 in 1989. Rudimentary notions of separation of powers require this Court to honor and enforce Congress' lawful enactments: this Court could no more ignore 4 U.S.C. § 111 than it could repeal it. Accordingly, even if this Court were sympathetic to the Department of Taxation's pleas, it nonetheless would have to apply 4 U.S.C. § 111 by its unambiguous terms. For this reason as well, the decision below must be reversed.

3. The decision below rests on a nonretroactive application of *Davis*, *i.e.*, the court below treated this case as one of "pure prospectivity." But the viability of "pure prospectivity" is very much in doubt. In *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 51 n.35 (1990), five Justices of this Court held that nonretroactive decisionmaking was not a proper judicial function. That holding, as a matter of *stare decisis*, is binding here. Moreover, even if "pure prospectivity" were extant, that doctrine could at best apply to

cases that break with clear past precedent or are in some other sense revolutionary. *Davis* is not such a case.

Even were *Chevron* analysis appropriate here, however, *Davis* would nonetheless have to be applied retroactively. *Davis* did not establish any new principle of law: rather it merely represented an exposition of the unambiguous terms of 4 U.S.C. § 111 and application of this Court's settled precedent. Moreover, nonretroactive application of *Davis*, and hence nonretroactive application of 4 U.S.C. § 111, would frustrate the core principle of the Supremacy Clause that Congress' acts are the supreme law of the land. So too, it would negate the effect of the intergovernmental tax immunity doctrine, which is to render void taxation beyond Congress' waiver of immunity. Finally, nonretroactive application of *Davis* would be grossly inequitable: the Department of Taxation's claims of poverty and ignorance of the law cannot justify withholding relief from petitioners.

4. The Department of Taxation argues that even if *Davis* must be applied retroactively, this Court may nonetheless deny petitioners a remedy for the unlawful deprivation of property they suffered. That is, the Department of Taxation argues that the cost of refunding the unconstitutional taxes imposed upon petitioners is so great that this Court may deny petitioners relief altogether. This argument defies this Court's tandem holdings in *McKesson* and *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), which make clear that when a state has been found to have exacted an unconstitutional tax, Due Process requires that the taxpayers be afforded meaningful backward-looking relief. Thus, contrary to the Department of Taxation's assertions, under the Fourteenth Amendment, petitioners are entitled to refunds of the taxes unlawfully imposed upon them.

ARGUMENT

I. *BEAM* REQUIRES THAT *DAVIS* BE APPLIED RETROACTIVELY

The court below denied petitioners refunds of the income taxes unconstitutionally imposed on their federal pensions, concluding that "the *Davis* decision is not to be applied retroactively." Pet. App. at 17a. That is, based upon its notions of equity, the court below treated the discriminatory taxes imposed on petitioners' pensions as if they had been constitutional. In so doing, however, the court below erred: under the rule of *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, *Davis* must be given retroactive effect.

Although there was no majority opinion for the Court in *Beam*, its mandate is unmistakable. In announcing the judgment of the Court, Justice Souter (joined by Justice Stevens) rejected "modified" or "selective" prospectivity:

> [W]hen the Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata.

111 S. Ct. at 2448. *See also id.* at 2448 (White, J., concurring in the judgment) ("There [is] no precedent in civil cases applying a new rule to the parties in the case but not to others similarly situated"). Justices Blackmun and Scalia went a step further in their concurrences: they rejected both "pure" and "selective" prospectivity. *See id.* at 2450 (Blackmun, J., concurring in the judgment) and 2451 (Scalia, J., concurring in the judgment). Thus, the rule of *Beam* is that if this Court applies the rule of law it announces in any given case to the litigants before it, then all other courts must similarly apply that rule to litigants before them.

Accordingly, the dispositive issue in this case should have been whether this Court applied the rule of law announced in *Davis* to the parties in that case. Yet on this

point, there can be no real dispute: as a result of this Court's ruling, Michigan paid, and Paul Davis received, a refund of the state income taxes he had paid. *See Davis*, 489 U.S. at 817, *citing Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239, 247 (1931) ("to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund."). *See also Davis v. Department of Treasury*, 446 N.W.2d 531, 531 (Mich. App. 1991) (recognizing that this Court ordered that "plaintiff [shall] receive a refund for overpayment of taxes resulting from this disparate treatment."). This Court considered the validity of Michigan's discriminatory tax scheme, found it unconstitutional, and applied that finding to hold that Mr. Davis was entitled to a refund.

Notwithstanding *Beam's* evident command, the court below found that it was free to determine on its own whether to apply *Davis* retroactively:

> The present case, however, is distinguishable from *Beam*. Although the Supreme Court in *Bacchus [Imports Ltd. v. Dias*, 468 U.S. 263 (1984)] applied its rule retroactively to the litigants in that case, the Court made no such ruling in *Davis*. Indeed, the issue of retroactivity was not considered by the Supreme Court in *Davis* because Michigan previously had agreed to the payment of a refund to Davis if its taxing scheme were invalidated. 489 U.S. at 817.

Pet. App. at 4a. The court went on to hold that because the issue of refunds was conceded by Michigan and not decided by this Court, "we are not foreclosed by precedent from applying the three-pronged *Chevron Oil* test in deciding the retroactivity issue in the present case." *Id.*, *citing Swanson v. North Carolina*, 407 S.E.2d 791, 795, *aff'd on reh'g* 410 S.E.2d 490 (N.C. 1991), *petition for certiorari filed*, 60 U.S.L.W. 3655 (U.S. Mar. 4, 1992) (No. 91-1436).[2]

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[2] The Supreme Courts of Montana and South Carolina have similarly followed *Swanson* to conclude that the refund remedy in

In so holding, the court below misread *Beam*. Foremost, its focus on Michigan's concession that a refund would be the most appropriate remedy for the invalidation of its tax[3] is misplaced. As this Court previously has held, and as *Beam* emphasizes, the substantive question of the constitutionality of a tax and the remedial question arising upon its invalidation are two separate questions. *American Trucking Ass'ns v. Smith*, 496 U.S. at 194; *Beam*, 111 S. Ct. at 2443. Though rarely addressed, a necessary third question is the choice of law question critical to *Beam's* analysis: should the Court apply the rule of law announced in the case to the parties before it?[4]

In *Davis*, the Court held that Michigan's tax violated the Supremacy Clause and 4 U.S.C. § 111. 489 U.S. at 817. Self-evidently, had the Court not invalidated the tax, Michigan's concession would have been of no moment. And, had this Court invalidated the tax, but not applied

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Davis is not "precedent." *See Sheehy v. Montana*, 820 P.2d 1257, 1259 (Mont. 1991), *petition for certiorari filed*, 60 U.S.L.W. 3675 (U.S. Mar. 9, 1992) (No. 91-1473); *Bass v. South Carolina*, 414 S.E.2d 110, 115 (S.C. 1991), *petition for certiorari filed*, 60 U.S.L.W. 3755 (U.S. Apr. 24, 1992) (No. 91-1697).

[3] Michigan did not concede that the Court's decision would apply retroactively; such a concession, in any event, would not have had any force. *See, e.g., Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 112 S. Ct. ——, ——, 1992 WL 132445 at *7 (1992) (Rehnquist, C.J., dissenting) (stipulations on questions of law are not binding on the Court). Rather, what Michigan conceded was that its refund statute was adequate to satisfy the mandate of equal treatment and that the Court therefore need not retroactively impose a tax on state retirees. Brief for Appellee at 63, *Davis* (No. 87-1020).

[4] This is the question of "pure prospectivity" left open by the Court in *Beam*. Petitioners submit that this question must always be answered in the affirmative—that the Court is bound to decide cases based upon its best current understanding of the law. *See infra* at 19-20. The Court need not reach this question, however, to reverse the court below.

that holding to the parties before it, that concession also would have been inconsequential. Michigan's concession only became operative upon the Court's invalidation of the tax *and* its application of that holding to the parties before it.

Thus the court below misperceived the nature of this Court's holding in *Davis*. Indeed, its conclusion that "the issue of retroactivity was not considered by the Supreme Court in *Davis* because Michigan previously had agreed to the payment of a refund," Pet. App. at 4a, is a *non sequitur*. Michigan's concession may have determined what remedy this Court would provide, but it did not drive the determination that a remedy was required. Regardless of whether *Davis*' holding that refunds were required is "precedent," there can be no dispute that this Court "decided the issue" (Pet. App. at 4a) in *Davis* to apply its substantive holding to the parties before it and require a remedy. Under *Beam*, it is this determination that, as a matter of equality and *stare decisis*, requires that every other court apply *Davis*' substantive holding to the parties before them. 111 S. Ct. 2446.

Moreover, the lower court's inquiry into how and why this Court decided to apply its ruling in *Davis* to the parties before it is misguided. Undeniably, the Court considered remedial issues in *Davis*: it held that Paul Davis was entitled to a refund. 489 U.S. at 817. Yet as *Beam* makes clear,

> *any* consideration of remedial issues necessarily implies that the precedential question has been settled to the effect that the rule of law will apply to the parties before the Court.

111 S. Ct. at 2445 (emphasis added). Simply that this Court addressed remedies at all demonstrates that it applied its ruling to the parties before it.

Admittedly, the issue of retroactivity was not mentioned in *Davis*. While the court below took this silence as an invitation for it to decide the retroactivity of *Davis*,

in fact, this Court's silence on retroactivity in *Davis* mandates it retroactive application.

Specifically, as this Court has repeatedly held, the overwhelming presumption is that judicial decisions operate retroactively. *See, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Robinson v. Neil*, 409 U.S. 505, 507-08 (1973). *See also Beam*, 111 S. Ct. at 2442. Thus, if retroactivity is not addressed, then the decision operates retroactively. *See Beam*, 111 S. Ct. at 2445-46 n.2 (whether "the prospectivity issue can . . . be said to have been litigated and by implication actually to have been decided by the [*Bacchus*] Court" was "unnecessary" to the holding in *Beam*. *See also id.* at 2448 (White, J., concurring) ("even if . . . the Court was quite wrong in [applying its ruling in *Bacchus* to the parties before it], that is water over the dam, irretrievably."). Indeed, on this point the Court in *Beam* was unanimous. *See Beam*, 111 S. Ct. at 2451 (O'Connor, J., dissenting) ("Given that the usual course in cases before this Court is to apply the rule announced to the parties in the case, the most reasonable reading of [*Bacchus*' silence on retroactivity] is that the Court followed its customary practice.").

The court below held that "because the retroactivity issue was not decided in *Davis*," it was free to decide it. But as *Beam* makes clear, because the Court in *Davis* "did not reserve the question of whether its holding should be applied to the parties before it," 111 S. Ct. at 2445, *Davis* must "properly be understood to have followed the normal rule of retroactive application in civil cases." *Id.* Thus the court below erred in holding that the retroactivity issue was not decided in *Davis*: this Court did not hold that *Davis* would operate prospectively only; nor did it reserve the issue of retroactivity Accordingly, this Court decided that *Davis* would operate retroactively.[5]

[5] In *Barker v. Kansas*, 112 S. Ct. 1619 (1992), this Court invalidated Kansas' discriminatory taxation of military retirees. As in *Davis*, the Court made no mention of the issue of retroactivity, even though the issue was raised in *amicus* briefs and at oral argument. Thus *Barker*, like *Davis*, is properly understood to operate retroactively.

II. THIS COURT MUST ENFORCE 4 U.S.C. § 111 ACCORDING TO ITS TERMS

Under *Beam's* rubric of choice of law, the Department of Taxation urges the Court to adopt a nonretroactive application of *Davis* and thus to choose some other law to resolve this controversy.[6] That is, the Department of Taxation asks this Court to act as if it had not decided *Davis*, or had decided it another way. But to accept the Department of Taxation's invitation, this Court would have to act as if Congress had never enacted 4 U.S.C. § 111. That this Court may not so indulge the Department of Taxation is as fundamental as *Marbury v. Madison*.[7]

In *Davis*, this Court considered and applied the Public Salary Tax Act of 1939, 4 U.S.C. § 111. Focusing on the "plain language of the statute," 498 U.S. at 808, the Court had "no difficulty" concluding that "civil service retirement benefits are deferred compensation for past years of service rendered to the Government," *id.*, and

[6] Although the court below purports to have applied *Davis* nonretroactively, it made no effort to determine how it would have decided this case had it arisen before *Davis* was decided. Certainly after this Court decided *Memphis State Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), two years before the first tax year in dispute here, there could be no dispute that Virginia's tax scheme violated the intergovernmental tax immunity doctrine. Indeed, even when enacted, Virginia's statute clearly transgressed constitutional bounds. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 486-87 (1939) (irrespective of "whether the taxed income be salary *or some other form of compensation*," the state's power is only to impose "non-discriminatory" taxes,) (emphasis added). Thus, the decision's characterization as a "nonretroactive" application of *Davis* is inaccurate. Rather, it is merely a "nonapplication" of *Davis*, 4 U.S.C. § 111 and the intergovernmental tax immunity doctrine.

[7] 5 U.S. (1 Cranch) 137, 177 (1803).

thus encompassed within the ambit of 4 U.S.C. § 111. Similarly, the Court dismissed Michigan's "hypertechnical" argument that the statutory prohibition extended only to discrimination against officers or employees, but not retirees. The Court held:

> [T]he overall meaning of § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits, and other forms of compensation paid on account of their employment with the Federal Government, except to the extent that such taxation discriminates on account of the source of compensation.

489 U.S. at 810. "Any other interpretation," the Court held, "would be implausible, at best." *Id.*

Virginia's now-repealed tax was legally indistinguishable from Michigan's: it imposed greater burdens on federal retirees, as compared to state retirees, based solely on the source of compensation. Indisputably, it violated 4 U.S.C. § 111—indeed, the court below so found. *See* Pet. App. at 12a (noting that the General Assembly "had acted to correct the defects in its statute."). Yet under the banner of nonretroactivity, the court below held, and the Department of Taxation now asks this Court to hold, that "Virginia's taxing statute was legitimate." *Id.*

In reality, Virginia's taxing statute violated 4 U.S.C. § 111 as much when *Davis* was decided as it did when Virginia enacted it in 1942. When Virginia began its discriminatoy taxation of federal retirees in 1942, it began taxing beyond the scope of Congress' waiver of immunity. Thus, in view of the unambiguous command of 4 U.S.C. § 111, Virginia's taxing statute was never "legitimate" and it could only be treated as so by ignoring 4 U.S.C. § 111, or pretending that Congress had enacted it in 1989 rather than in 1939.

The Department of Taxation now asks this Court to seize this fiction—it requests that this Court ignore 4 U.S.C.

§ 111 and choose some other law than that enacted by Congress in 1939 to resolve this controversy. Merely stating this proposition betrays its utter invalidity: the Constitution compels this Court to honor and enforce Congress' unambiguous enactments.

This Court's role in cases arising under "the Laws of the United States" is well defined. U.S. Const. Art. III, sec. 2, cl. 1. As this Court recently held in *Stewart Organization, Inc v. Ricoh Corp.*, 487 U.S. 2, 27 (1988):

> If the . . . court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress' authority under the Constitution. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). If Congress intended to reach the issue before the . . . Court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter; "*[f]ederal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power.*" *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967).

(Emphasis added.) There is no dispute here that 4 U.S.C. § 111 "represents a valid exercise of Congress' authority under the Constitution." As this Court held in *Davis*, in enacting 4 U.S.C. § 111, Congress sought to codify the constitutional imperative of the intergovernmental tax immunity doctrine. 489 U.S. at 813. Nor can there be any dispute that "Congress intended to reach the issue" before the Court; again as this Court held in *Davis*, the unambiguous mandate of the statute was to prohibit just the type of discriminatory taxation at issue here. 489 U.S. at 812. Thus, "that [must be] the end of the matter." *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. at 27.

Nonetheless, the Department of Taxation asks this Court to exempt it from Congress' express mandate, ar-

guing that enforcement of Congress' will is inequitable (*i.e.* expensive). But even were there merit to the Department of Taxation's equitable plea, this Court could not entertain it: the judiciary has no "license[] to attempt to soften the clear import of Congress' chosen words whenever a court believes that those words lead to a harsh result." *United States v. Locke*, 471 U.S. 84, 95 (1985). *See also Maryland v. United States*, 381 U.S. 41, 53, *vacated on other grounds*, 382 U.S. 159 (1965) ("It is nevertheless our duty to take the law as we find it, remitting those aggrieved to whatever requitement may be deemed appropriate by Congress.")

As this Court held in *United States v. Rutherford*, 442 U.S. 544, 555 (1979):

> Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.

Here, Congress has spoken. Even if this Court were sympathetic to the Department of Taxation's pleas of ignorance (of the law) and poverty, it nonetheless would be compelled to enforce the law as enacted by Congress:

> [W]e have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible . . . we must give effect to that intent.

Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962), *rev'd on other grounds*, *Boys Market, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970). Such is this Court's constitutional role, *see Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991) ("if the intent of Congress is clear, that is the end of the matter; for the court must . . . give effect to the unambiguously expressed intent of Congress"), and such has it always been. *See Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797) ("the intention of the legislature, when discovered, must prevail"); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) ("even if great inconvenience will result," if "the meaning of the legislation be plain . . . it must be obeyed.")[8]

Against this framework, it is not surprising that this Court has never relied on *Chevron* or any other form of nonretroactive decisionmaking as a basis for refusing to apply a lawful act of Congress. Indeed, of all the cases cited in *American Trucking Ass'ns* as examples of cases in which this Court has applied a rule or remedy nonretroactively, not one is a case involving defiance of a federal statute. That is, in none of those cases did this Court choose to ignore an applicable act of Congress in determining the validity of the challenged conduct.

The majority of the cases cited in *American Trucking Ass'ns*, and the majority of the instances where the issue of retroactivity arises, are constitutional cases. *See e.g., Michigan v. Payne*, 412 U.S. 47 (1973) (Fifth Amendment case holding that state court erred in applying *North Carolina v. Pearce*, 395 U.S. 711 (1969)); *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) (right to counsel case holding that the state court erred in refusing to apply *White v. Maryland*, 373 U.S. 59 (1963), retroactively).[9] Statute of limitations cases, such as *Chevron* and *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608-09 (1987), involve tolling of *state* statutes of limita-

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[8] *See also Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 96 (1981) ("Even in admiralty, however, where the federal judiciary's lawmaking power may well be at its strongest, it is our duty to respect the will of Congress.")

[9] As discussed more fully *infra*, statutory cases are rarely candidates for nonretroactive application because it would ordinarily be the statute, and not a judicial decision construing it, that would establish any "new principle of law." The retroactivity jurisprudence of legislation is distinct from that of judicial decisions. *Security Industrial Bank*, 459 U.S. at 79; *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990).

tions; they are not cases in which this Court has delayed application of any federal statute. Other federal statutory cases, such as *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) and *Buckley v. Valeo*, 424 U.S. 1, 142-43 (1976), are instances in which this Court, after declaring an act of Congress unconstitutional, stayed its judgment to allow Congress time to cure the defect in its legislation.

The only other major class of statutory cases in which retroactivity has arisen is in Title VII pension cases such as *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983), and *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). *See also Florida v. Long*, 487 U.S. 223 (1988). In these cases, after finding a violation of Title VII (42 U.S.C. § 2000e-5), the Court has provided less than full retroactive relief. Yet these cases are not ones in which this Court has used prospective decisionmaking to supervene an act of Congress. Rather, they are cases in which this Court, in fashioning an appropriate remedy, was exercising the broad equitable discretion accorded to it by Congress.[10] Thus, in *Manhart*, the Court reversed the district court's provision of full retroactive relief, holding that "the District Court gave insufficient attention to the equitable nature of Title VII remedies." 435 U.S. at 719. Similarly, in *Norris*, the Court anchored its withholding of retroactive application of its decision upon Title VII's specific remedial provisions. *See id.*, 463 U.S. at 1110-11, (O'Connor, J. concurring) ("Such a prospective holding

[10] 42 U.S.C. § 2000e-5(g) provides:

> [T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate.*

Emphasis added.

is, of course, consistent with our equitable powers under Title VII to fashion an appropriate remedy.") These cases do not stand for the proposition that this Court may simply ignore a controlling act of Congress; to the contrary, they demonstrate that this Court will hew to the letter and spirit of the law in adjudicating cases arising under Congress' acts.[11]

Properly viewed, this case is not about retroactive versus prospective application of *Davis*. Rather, it is about application of 4 U.S.C. § 111. Of course there can be no dispute that Congress intended the Public Salary Tax Act of 1939 to become effective well before March 28, 1989, the date this Court decided *Davis*. *See* Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575 (the "United States hereby consents to the taxation of compensation, *received after December 31, 1938*, for personal services as an officer or employee of the United States," (emphasis added). And, "where the congressional intent is clear, it governs." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110 S. Ct. 1570, 1577 (1990). While this Court certainly has the authority to ascertain when Congress intends an act to become effective, *id.*, once the law has become operative, it becomes the supreme law of the land, subject only to repeal by a subsequent Congress. Congress has not repealed the Public Salary Tax Act, and, the Department of Taxation's wishes notwithstanding, this Court cannot.

[11] In neither *United States v. Estate of Donnelly*, 397 U.S. 286 (1970), nor *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), did the Court refuse to apply an act of Congress on retroactivity grounds. Indeed, this Court held that *Simpson* was entitled to retroactive effect. *See Simpson v. Union Oil Co.*, 396 U.S. 13, 14 (1969). Nor in *Allen v. State Board of Elections*, 393 U.S. 544, 571-72 (1969), did the Court sanction a violation of a clear congressional mandate in the name of prospective decisionmaking. Thus no statutory case cited in *American Trucking Ass'ns* stands for the proposition that this Court's retroactivity jurisprudence can trump an unambiguous act of Congress.

The court below decided this case by choosing to ignore 4 U.S.C. § 111 (indeed, in neither of its opinions in this case does the court below even cite to this statute). The Department of Taxation now asks this Court, in the name of "prospective decisionmaking," to choose to ignore it as well. But this Court cannot pick and choose which, among Congress' acts, to apply; rather, the most rudimentary concepts of separation of powers require this Court to honor and enforce Congress' lawful enactments. If this Court can choose to ignore a congressional enactment in any given case because it believes the result would be inequitable, then it has completely usurped Congress' power to legislate. No longer would the Constitution serve as the limit of the legislative power; instead this limit would be the judiciary's concept of equities in any given case. Thus, no longer would ours be a "government of laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) at 163.

Accordingly, in asking this Court to exempt it from the reach of 4 U.S.C. § 111, the Department of Taxation is asking this Court to step well beyond its constitutional bounds. This Court's duty is "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177, not, as the Department of Taxation would have it, to pretend that the law is something quite different. Because this Court cannot treat 4 U.S.C. § 111 as if it had never been enacted, but instead must apply it according to its unambiguous terms, the decision of the court below must be reversed.

III. EVEN IF *CHEVRON* ANALYSIS WERE APT HERE, *DAVIS* WOULD NONETHELESS HAVE TO BE APPLIED RETROACTIVELY

In its initial decision in this case, "reaffirm[ed] . . . in all respects" (Pet. App. 5a) after remand from this Court, the court below purported to engage in a *Chevron* analysis to conclude that *Davis* was not to be applied retroactively. Pet. App. 10a-14a. As noted above, *Chevron*

is wholly inapposite under the circumstances of this case: *Beam* requires that retroactive effect be accorded to *Davis*, and fundamental notions of separation of powers preclude this Court from ignoring Congress' unambiguous command. But even beyond these arguments, however, there still remain substantial hurdles before this Court can even reach the merits of the lower court's application of *Chevron* here: this Court must first determine that "pure prospectivity" may ever be appropriate, and, if so, whether the bounds of this doctrine could reach a case such as this.

In his opinion announcing the judgment of the Court in *Beam*, Justice Souter explicitly left open the question of whether "pure prospectivity" remains viable: "We do not speculate as to the bounds or propriety of pure prospectivity." 111 S.Ct. at 2448. *See also id.* at 2449 (White, J., concurring in the judgment) ("To nevertheless 'speculate' about the issue is only to suggest that there may come a time when our precedents on this issue will be overruled.") This Court has grappled with the issue of pure prospectivity for the past four Terms[12], and the issue has proved to be particularly difficult and divisive. Significantly, however, in *McKesson*, five justices of this Court rejected nonretroactive decisionmaking. *See* 496 U.S. at 51 n.35. While two members of the Court in *McKesson* are no longer on the Court, *stare decisis* nonetheless precludes this Court from reversing itself on so ephemeral a basis. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. ——, ——, 1992 WL 142546 at *19 (1992) (joint opinion of Justices O'Connor, Kennedy and Souter) (" 'A basic change in the law upon a

[12] *See McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 492 U.S. 916 (1989) (restoring the case to the calendar for reargument and requesting briefing on the issue of the whether prospective decisionmaking was proper); *American Trucking Ass'ns v. Smith*, 496 U.S. 167; *Beam*; *Allied-Signal Corp. v. Director of Taxation*, 112 S.Ct. 1461 (1992) (requesting rebriefing on the potential issue of prospective application of a decision reversing prior Supreme Court precedent.)

ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve,'" *quoting Mitchell v. W.T. Grant*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)). Accordingly, while *Beam* did not speculate as to the propriety of pure prospectivity, *stare decisis* demands that this Court adhere to the holding in *McKesson* and thus reaffirm that all decisions operate retroactively.

Not only must this Court determine that prospective decisionmaking is a proper judicial function before addressing the lower court's *Chevron* analysis, so too must it determine that the bounds of that doctrine would reach a case such as this. Yet even assuming that pure prospectivity remains viable, it is evident that the scope of that doctrine has been significantly curtailed since its popularization over two decades ago. Indeed, even if "pure prospectivity" were ever appropriate, it could not be in a case such as this, where there is no suggestion that any precedent has been overruled and nonretroactivity is being used as an excuse to withhold refunds of unconstitutional taxes.

Specifically, this Court's recent decisions on retroactivity demonstrate that decisions that do not overturn Supreme Court precedent are not even candidates for prospective-only application. For example, in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662-63 (1987), the Court refused to allow tolling of the statute of limitations in a case where the court of appeals had reversed itself and shortened the statute of limitations for bringing claims under 42 U.S.C. § 1981. In *Goodman*, this Court affirmed the court of appeal's selection of the shorter personal injury statute of limitations over that governing contractual actions. The Court found nonretroactive application inappropriate because

> there had been no authoritative specification of which statute of limitations applied to an employee's § 1981 claims, and hence no clear precedent upon which petitioners could have relied when they filed their complaints . . .

482 U.S. at 662-63. The Court did not consider, as at least arguably must have been the case, whether at the time the complaint was filed the issue of which statute of limitations period would apply was one of "first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106.

Similarly, in both *Ashland Oil Inc. v. Caryl*, 497 U.S. 916, 9—, 110 S. Ct. 3202, 3205 (1990), and *National Mines Corp. v. Caryl*, 497 U.S. 922, 9—, 110 S. Ct. 3205, 3206-07 (1990), this Court held that its decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), must be applied retroactively. Rejecting the assertion that any clear precedent had been overruled, and holding that its decision did not amount to resolution of "a wholly new issue of first impression" whose "resolution was not clearly foreshadowed," 110 S. Ct. at 3205, the Court reversed the state court's prospective-only application of *Armco*. Thus it was not enough that the Court extended its precedent into an entirely new area of Commerce Clause jurisprudence or that its decision "paved the way" for an arguable overruling of "a lengthy list of settled decisions." 110 S. Ct. at 3205. Because "*Armco* itself . . . was not revolutionary," *id.*, as a matter of federal law it applied retroactively.

These cases demonstrate that this Court has pulled away from the broadest construction of *Chevron's* notion that a new principle of law may be established "in a case of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. It is not enough for purposes of retroactivity that the outcome of a case is debatable. Indeed, if debatable outcomes were the test, then virtually every case this Court hears would pre-

sumptively apply nonretroactively. Yet "the general rule of long standing is that the law announced in this Court's decisions controls the case at bar." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 485 (1989). Rather, if resolution of an issue is doubtful, then there can be no reliance on "clear past precedent" sufficient to invoke nonretroactivity. *Goodman v. Lukens Steel Co.*, 482 U.S. at 662-63. And, absent a break with clear past precedent, only if this Court's extension of existing precedent to answer a novel question is "revolutionary" might nonretroactivity be considered.

In addition to these limitations, it is now apparent that when governmental entities are involved, *Chevron* may only apply in cases overturning precedent of this Court. In *Owen v. City of Independence*, 445 U.S. 622, 654-55 (1980), this Court held that "[e]lemental notions of fairness" dictate that it is fairer to allocate the cost of an unforeseen constitutional development "to the inevitable costs of government borne by all taxpayers," rather than "to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." While this analysis may "not apply when a decision clearly breaks with precedent," *American Trucking Ass'ns*, 496 U.S. at 185, it must apply in all other cases of unforeseen constitutional developments. As *Beam* and *American Trucking Ass'ns* demonstrate, the central theme in retroactivity jurisprudence is *stare decisis*. 111 S. Ct. at 2446; 496 U.S. at 196. But considerations of *stare decisis* do not come into play in cases, such as this, that do not break with established precedent. Thus, absent a clear break with precedent, "[e]lemental notions of fairness" dictate that constitutional decisions of this Court must apply against governmental entities, even if unforeseen.

If "pure prospectivity" remains viable, then this formulation must state its broadest reach: if resolution of an issue is doubtful, nonretroactivity may only be appropriate if the Court's ruling is "revolutionary." However, if

the case pits citizens or taxpayers against a sovereign, retroactivity may only be appropriate if the Court's decision represents a break from clear past precedent. Applying this test to *Davis* indisputably yields retroactive application. Because the Department of Taxation cannot plausibly assert that *Davis* was in any sense "revolutionary," *Ashland Oil* requires that it be applied retroactively. And, because the Department of Taxation does not contend that *Davis* overruled any past precedent,[13] this same result attains under *Owen*.

Petitioners submit that there is no need to engage in a detailed *Chevron* analysis: these factors are dispositive. Yet even were the Court to apply *Chevron* here, it nonetheless could not sustain the decision below. At bottom, the lower court's application of *Chevron* is flawed in every respect.

A. Because *Davis* Did Not Establish a New Principle of Law, It Must Be Applied Retroactively

A decision of this Court may only be applied nonretroactively if, in the first instance, it "establish[es] a new principle of law." *Chevron*, 404 U.S. at 106. This is a threshold test: if the decision announces "an entirely new and unanticipated rule of law," *United States v. Johnson*, 457 U.S. 537, 550 and n.12 (1982), *i.e.*, if the decision is "revolutionary," *Ashland Oil Co. v. Caryl*, 110 S. Ct. at 3204, then it may be a candidate for nonretroactive appli-

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[13] The Department of Taxation's principal argument for nonretroactive application of *Davis* is that its statute had been in effect for 47 years before *Davis* was decided; that because it had been unconstitutionally taxing federal retirees in Virginia since 1942 it should be relieved of its constitutional obligation to refund those taxes for which a timely claim for refund may still be made. Op. Cert. at 7. The statute struck down in *Armco* had been in effect for more than 50 years, yet the Court did not suggest that this fact was even relevant to determining whether *Armco* established a "new principle of law." *Ashland Oil Co.*, 110 S. Ct. at 3205 n.*.

cation.[14] If not, then it must be applied retroactively. *See McKesson*, 496 U.S. at 31 n.15; *Goodman v. Lukens Steel Co.*, 482 U.S. at 654-55.

At the outset, it is difficult to discern how a true statutory case [15] could ever satisfy the threshold *Chevron* test. If Congress has spoken clearly in its statute (as it did in 4 U.S.C. § 111), then any "new principle of law" necessarily must arise from the statute, not from a decision of this Court construing it. Moreover, if Congress' language is ambiguous, then this Court's choosing one of many possible constructions cannot come as such a surprise that it would upset "justifiable reliance" on any one interpretation. Only perhaps in the case where this Court were to reverse a previous statutory construction (separation of powers considerations aside), might there be a case for nonretroactive application of a decision construing a federal statute. *United States v. Estate of Donnelly*, 397 U.S. at 295. Certainly *Davis* is not such a case.

In any event, "a decision of this Court [that does] nothing more than apply settled precedent to different fact situations" must always apply retroactively. *Griffith v. Kentucky*, 479 U.S. 314, 324 (1987). Because *Davis* is no more than an exposition of the plain language of 4 U.S.C.

[14] That is, a new principle of law is established when there is "such an abrupt and fundamental switch in doctrine as to constitute an entirely new rule which in effect replaced an older one." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 498 (1968). Thus, for a case to establish a "new principle of law," it must present either "a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." *Id.*, 392 U.S. at 499.

[15] *I.e.*, interpretation of an Act of Congress. This Court has frequently addressed the retroactivity of constitutional law decisions, including decisions invalidating federal statutes. *See supra* at 15-16. With the exception of Title VII pension cases, which are gauged by a distinct standard, *see Florida v. Long*, 487 U.S. at 230, this Court has at most on a handful of occasions ever addressed whether its construction of an Act of Congress should have retroactive effect.

§ 111, and an application of settled precedent to a new set of facts, it is not a candidate for nonretroactive application.

The holding in *Davis* followed naturally and unexceptionally from settled law. The first aspect of the *Davis* decision—that 4 U.S.C. § 111 applies to both current pay and retirement pay of federal employees—was established by the plain language of the statute. *Davis*, 489 U.S. at 808 n.3 ("[t]he language of the statute leaves no room for doubt on this point."). Moreover, that civil service retirement benefits constituted "deferred compensation" had been established by the Civil Service Retirement Act of 1920, 41 Stat. 614. *See also* 59 Cong. Rec. 6300 (Apr. 29, 1920) (statement of Rep. Hamill: federal pensions "should be looked upon as deferred wages."). Similarly, Michigan's "hypertechnical" argument that Congress consented to the taxation of federal retirement benefits but did not prohibit discriminatory taxation of these benefits was belied by the statutory language:

> The reference to "*the* pay or compensation" in the last clause of § 111 must, in context, mean the same "pay or compensation" defined in the first part of the section.
>
> * * * *
>
> Any other interpretation of the nondiscrimination clause would be implausible at best.

489 U.S. at 810 (emphasis original). Thus, *Davis* concluded:

> [T]he overall meaning of 4 U.S.C. § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits, and other forms of compensation paid on account of their employment with the Federal Government, except to the extent that such taxation discriminates on account of the source of compensation.

489 U.S. at 810.

Having concluded that by its plain and unambiguous terms 4 U.S.C. § 111 included retirement benefits within the conditional grant of immunity from state taxation, the Court then went on to determine whether Michigan's tax "discriminate[d] because of the source of pay or compensation." In this regard, the Court concluded that, because of "the similarity of language and purpose between the constitutional principle of nondiscrimination and the statutory nondiscrimination clause," and because "§ 111 was consciously drafted against the background of the Court's tax immunity cases," the "retention of immunity in § 111 is coextensive with the prohibition against discriminatory taxation embodied in the modern constitutional doctrine of intergovernmental tax immunity." 489 U.S. at 813. In this regard, the Court cited *Memphis State Bank & Trust Co. v. Garner*, 459 U.S. at 396-97 (Congress' consent to "nondiscriminatory" state taxation of interest on federal obligations in 31 U.S.C. § 742 is "principally a restatement of the constitutional rule."). Thus the Court proceeded to determine whether Michigan's tax violated the constitutional doctrine of intergovernmental tax immunity.[16]

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[16] The Court recognized that 4 U.S.C. § 111 could also be read to create "an affirmative statutory grant of immunity from discriminatory taxation," 489 U.S. at 813, but saw no need to examine the scope of this statutory immunity. *See South Carolina v. Baker*, 485 U.S. 505, 518 n.11 1987 (the federal government "possesses the power to enact statutes to immunize those with whom it deals from state taxation even if [the] intergovernmental tax immunity doctrine would not otherwise confer an immunity."). The dissent in *Davis* criticized the application of the constitutional doctrine because Michigan's discriminatory tax did not apply exclusively to federal retirees, but instead applied "to the vast majority of Michigan residents." 489 U.S. at 818 (Stevens, J., dissenting). *See also Barker v. Kansas*, 112 S. Ct. at 1626 (Stevens, J. concurring). Yet even if the constitutional immunity did not protect federal retirees, it is evident that the congressional grant of immunity would. In enacting the Public Salary Tax Act, Congress focused on the comparative taxation of compensation of federal and state employees because it was concerned "that considerations of fairness

Here again, the Court applied settled precedent to conclude that Michigan's tax was constitutionally discriminatory. The Court rejected Michigan's contention that the doctrine of intergovernmental tax immunity protected only the federal government and not individuals. "Indeed," the Court held, "all precedent is to the contrary." 489 U.S. 814, *citing, inter alia, Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 387 (1960); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392; *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961). Finally, the Court concluded "[t]he State offers no reasons for departing from this settled rule, and we decline to do so," (footnote omitted). 489 U.S. at 815.

Having concluded that the plain and unambiguous terms of 4 U.S.C. § 111 encompassed retirement benefits, having concluded that Congress intended to adopt the judicial interpretation of the intergovernmental tax immunity doctrine when it codified that concept (*citing Midlantic National Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502 (1986), and *Morissette v. United States*, 342 U.S. 246, 263 (1952)), having concluded that "all precedent" was to the effect that individuals were entitled to claim the protections of the in-

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demanded *equal tax treatment for state and federal* employees." 489 U.S. at 812 *citing* S.Rep. No. 112, 76th Cong., 1st Sess., 4 (1939); H.R. Rep. No. 26, 76th Cong., 1st Sess., 2 (1939) (emphasis added). "Equal tax treatment" cannot be read to include any "political check against abuse of the taxing power," 489 U.S. at 827, *quoting United States v. County of Fresno*, 429 U.S. 452, 462 (1977). Rather, it envisions a much simpler inquiry: are state employees and federal employees being taxed the same? *See also* S.Rep. No. 112, *supra*, at 9 (the Public Salary Tax Act "provides only for nondiscriminatory taxation of the compensation of public employees and is reciprocal in nature. Thus, whatever burden might be passed on to one government because of the taxation of its employees' compensation by another governmental unit would, in a measure, at least, be offset by the converse application of the proposal.").

tergovernmental tax immunity doctrine, the Court then held that

> [u]nder our precedents, "[t]he imposition of a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other] must be justified by significant differences between the two classes."

489 U.S. at 815-16, *quoting Phillips Chemical Co.*, 361 U.S. at 383. Finally, the Court held that Michigan's "rational basis" argument was insufficient to meet this test.

In light of *Davis*' reliance on the unambiguous language of 4 U.S.C. § 111 and its precedential underpinnings, the assertion that it constitutes "an avulsive change which caused the current of the law thereafter to flow between new banks," *Hanover Shoe Co. v. United Shoe Machinery Co.*, 392 U.S. at 499, is untenable at best. Nonetheless, the court below held that *Davis* established a new principle of law:

> [I]t is difficult to perceive how the General Assembly of Virginia should have been expected to perceive that a statutory scheme, exempting state pensioners from state taxation, would have placed any foreseeable and direct burden on some federal operation.

Pet. App. at 12a. While this is a dubious recasting of *Davis*' holding, in fact what the General Assembly easily should have perceived was what Congress provided by law in 1939 and what this Court held in *Phillips Chemical Co.* in 1960:

> [I]t does not seem too much to require that the State treat those who deal with the [federal] government as well as it treats those with whom it deals itself.

361 U.S. at 385. Certainly after this Court decided *Memphis State Bank* in 1983, two years before the earliest tax year in dispute here, the General Assembly could not reasonably expect that its statute would pass constitutional muster.

When Virginia enacted its tax preference for state pensioners in 1942, it did so in the face of a federal statute that unambiguously prohibited discriminatory taxation of federal retirees. Retroactivity analysis involves "[t]he process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old," *Lemon v. Kurtzman*, 411 U.S. 192, 198 (1973). If the Department of Taxation blindly relied upon Virginia's statute, without any consideration of 4 U.S.C. § 111 or this Court's intergovernmental tax immunity jurisprudence, then that reliance certainly was not justified. It is not enough, as the Department of Taxation asserts, that it did not foresee the invalidation of its tax. Op. Cert. at 7. *Davis* did not overturn any precedent of this Court; nor, given its precedential underpinnings, is it even a "case of first impression."[17] Rather, because *Davis* merely applied "settled precedent to a new set of facts," *United States v. Johnson*, 457 U.S. at 551, it was inevitable. Accordingly, *Davis* must be applied retroactively.

B. The Purposes Underlying the Supremacy Clause and the Balance of the Equities Here Require that *Davis* Be Applied Retroactively

Even if *Davis* could conceivably be characterized as satisfying *Chevron's* threshold test of establishing a "new principle of law," it nonetheless would have to be applied retroactively. While establishment of a new principle of law is necessary, it is not sufficient to render a decision nonretroactive. Rather, a decision announcing a new

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[17] Of course virtually every case heard in this Court is in some sense a case of first impression: absent some novelty in the case, there would rarely be any need for this Court to exercise its certiorari jurisdiction. But it is not enough for purposes of retroactivity that a case might be the first to construe a given statute—as this Court held in *New York v. Cathedral Academy*, 434 U.S. 125, 130 (1977), the law of retroactivity is not that "every . . . unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment."

principle of law may be applied nonretroactively only if the purposes underlying the constitutional doctrine in dispute would be furthered by nonretroactive application and the balance of the equities favors nonretroactive application. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. at 485-86. Nonretroactive application of Davis would frustrate the purposes underlying the Supremacy Clause and the intergovernmental tax immunity doctrine; so too would it work substantial inequity and hardship. Accordingly, *Davis* must be applied retroactively.

1. *The purposes of the Supremacy Clause and the intergovernmental tax immunity doctrine would be flouted by nonretroactive application of* Davis

Chevron requires that a court evaluate the purpose and effect of the legal rule in question and ascertain whether retrospective operation will further or retard the rule's operation. 404 U.S. at 106. The court below concluded that because the Virginia General Assembly had repealed its offending tax statute, and because "Virginia's taxing statute was legitimate until a new rule was announced in *Davis*,"

> the purpose of the intergovernmental tax immunity doctrine already has been fully served, and applying *Davis* retroactively would do nothing either to retard or further the doctrine's purpose.

Pet. App. at 12a. This reasoning is tautological: once this Court decided *Davis*, the Virginia General Assembly had no choice but to repeal its offending statute. Moreover, Virginia's taxing statute was not "legitimate" at any time, either before or after *Davis* was decided. Rather, it could only be "deemed" legitimate by employing the fiction of nonretroactive application of *Davis*. That is, the court below could only conclude that the second *Chevron* factor was in equipoise by assuming the result its *Chevron* analysis yielded.

Even employing this analysis, the court below did not conclude that retroactive application of *Davis* would *retard* the purposes underlying the Supremacy Clause and the intergovernmental tax immunity doctrine. Plainly, however, it ignored the ways in which retroactive application of *Davis* would further the underlying purposes of these provisions; indeed, it ignored the ways in which prospective-only application of *Davis* would flout them.

First, central to the Supremacy Clause is the tenet that federal statutory enactments supervene contrary state laws. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *Davis* rested not only on the principle of intergovernmental tax immunity, but also upon the unambiguous force of the Public Salary Tax Act, 4 U.S.C. § 111. The court below, by asserting the nonretroactivity of *Davis*, has effectively held that 4 U.S.C. § 111 did not apply in Virginia until March 28, 1989 (the day this Court decided *Davis*), fifty years after Congress passed the statute. Delaying the effective date of federal legislation is beyond the power of state courts and legislatures. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) at 436 ("States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress."). Nonretroactivity of *Davis* would flout the core principle of the Supremacy Clause that federal statutes upon enactment are the supreme law of the land; thus the underlying purpose of the Supremacy Clause mandates *Davis*' retroactive application.

Second, "the effect" of the intergovernmental tax immunity doctrine is to render void state taxes that discriminate against the federal government or those with whom it deals. Specifically, as this Court held in *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. at 752, *quoting Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. at 387, "a discriminatory tax is void and 'may not be exacted.'" Nonretroactive application

of *Davis* would thus negate the intended effect of this doctrine: taxes that "may not be exacted" would nonetheless be retained. For this reason as well retroactive application of *Davis* is required.

Third, allowing states to retain unconstitutionally exacted taxes provides them with a naked financial incentive to tax beyond the bounds of their authority even where, as here, the tax impermissibly drains the federal fisc and well-settled legal principles expose the illegality of the tax at the time it is collected. If anything, states must tread with caution when enacting tax schemes that may impermissibly impact the federal government. *Graves v. New York ex rel. O'Keefe*, 306 U.S. at 488 (Frankfurter, J., concurring). Nonretroactive application of *Davis* would signal states to tax not with caution but with abandon: if a state can hide behind nonretroactivity, it has every incentive to tax beyond its constitutional authority. Retroactive application of *Davis* is thus necessary to remove this perverse incentive.[18]

Finally, retroactive application of *Davis* will cause refunds to be paid to petitioners, and this will directly advance the purposes of the Supremacy Clause and the doctrine of intergovernmental tax immunity. As to petitioners themselves, they have legitimate compensatory interests safeguarded by the Supremacy Clause. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of the law."). Moreover, the federal govern-

[18] Nonretroactive application of *Davis* would also undermine the system of self assessment of taxes utilized throughout the country. If taxpayers lose confidence in their right to obtain refunds of illegally exacted taxes, then it is only a short step to their losing confidence in the fairness of the tax system as a whole. Thus, nonretroactive application of *Davis* jeopardizes the entire system of self assessment upon which federal, state and local governments depend.

ment, which had been involuntarily subsidizing the employment costs of Virginia and 22 other states for almost 50 years, stands to obtain a substantial portion of any refunds paid to petitioners. Thus, retroactive application of *Davis* will at least partially remedy the constitutional harm suffered by the federal government.

The intergovernmental tax immunity doctrine, at its core, dictates that states may not subsidize their operations through taxation of federal entities:

> Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.

Davis, 489 U.S. at 815, n.4. Yet this subsidy is precisely what Virginia has accomplished through its unconstitutional tax.[19] Thus, in defiance of this underlying purpose of the intergovernmental tax immunity doctrine, for fifty years Virginia has forced the federal government to bear a portion of Virginia's employment costs.

Petitioners paid the unconstitutional taxes to Virginia during the years 1985 through 1988. Similarly, they deducted from their federal income tax the state income taxes they paid. Any refund they obtain will be income to them, subject to federal taxation. *See* 26 U.S.C. § 111. While admittedly the federal government will not be able to obtain recompense for all the involuntary subsidy of states' employment costs it has borne, retroactive application of *Davis* will provide it at least some recovery. There can be no contention that retroactive application

[19] *See Davis*, 489 U.S. at 815 n.4:

> In order to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would result in higher federal income tax payments in some circumstances.

of *Davis* would somehow retard this purpose; to the contrary, this end could only be served by retraction of this involuntary subsidy through retroactive application of *Davis*.

2. *The Balance of the Equities Overwhelmingly Favors Retroactive Application of* Davis

Chevron's final criterion is a balancing of the equities to determine if "injustice or hardship [may be avoided] by a holding of nonretroactivity." 404 U.S. at 107. The court below concluded that "the equities weigh heavily in favor" of nonretroactive application of *Davis*. Pet. App. at 14a. This holding represents the lower court's most egregious error: the equities here overwhelmingly and conclusively favor retroactive application of *Davis*.

At the outset, the equities favor petitioners' compensatory interests over those of the Department of Taxation as a matter of federal law. As this Court held in *Owen v. City of Independence*, 445 U.S. at 654:

> It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. . . . Elemental notions of fairness dictate that one who causes a loss should bear the loss.

Even accepting the Department of Taxation's contention that *Davis* was not foresecable and that therefore it was merely relying in good faith on its presumptively valid statute, *Owen* nonetheless demonstrates that equity is in petitioners' corner:

> [E]ven where some constitutional development could not have been foreseen . . ., it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Owen, 445 U.S. at 655.[20]

[20] The plurality in *American Trucking Ass'ns* distinguished *Owen* as not applying in cases that "clearly break[] with precedent." 496 U.S. at 185. There is, of course, no contention here that *Davis* broke with any precedent of this Court. Neither can *Owen* fairly be limited to a statutory construction of 42 U.S.C. § 1983: it is cast in terms of "[e]lemental notions of fairness," *Owen*, 455 U.S. at 654, the cornerstone of due process.

Federal law aside, it is simply more equitable to place the financial consequences of remedying an unconstitutional income tax upon the government (and thus the citizenry as a whole) than upon the select subclass of taxpayers who have been forced to bear the unconstitutional burden in the first place. Because the Department of Taxation had no right to impose the taxes at issue here, by definition petitioners have paid more than their fair share for the benefits Virginia provided them: the revenue generated by the excessive taxes imposed on petitioners should have been raised by a nondiscriminatory tax upon the populace as a whole.[21] The suggestion that it is somehow more equitable to leave this disparate taxation in place than to remedy it is difficult to fathom.

Indeed, the Department of Taxation's equitable plea is ironic—its principal thrust is that because it had been unconstitutionally taxing federal retirees for 47 years, it should not be required to disgorge the last four years of its ill-gotten gains. Undoubtedly, the sum of its unconstitutional exactions since 1942 exceeds by more than an order of magnitude the amount at stake here.[22] How

[21] Alternatively, Virginia may have elected not to raise the revenue at all, in which case the consequence of its having lower revenues would have been borne equally by all its citizenry.

[22] Because this case was decided on the Department of Taxation's motion for summary judgment, the record does not reflect the amount of the refund claims actually at issue in this suit. The Department of Taxation estimates that its total refund exposure for 192,000 affected federal retirees state-wide to be $440 million: that ratio yields a refund claim of approximately $2,300 per claimant, or slightly less than one million dollars for the 420 named petitioners. While petitioners submit that these numbers are irrelevant to this Court's consideration of this case, it is likely that the De-

it could be inequitable to require Virigina to refund only a small fraction of what it has unlawfully taken is, again, difficult to comprehend.

Moreover, while the Department of Taxation bemoans the cost of complying with the Constitution, it must not be forgotten that its wounds are entirely self-inflicted. The majority of states have avoided Virginia's predicament by not imposing a discriminatory tax on federal retirees. But even aside from the wisdom of imposing this tax in the first instance, Virginia's troubles are of its own making.

Specifically, at least for 1988 state income taxes (that were not due until May 1, 1989), Virginia could have avoided any refund liability simply by imposing a tax at that time on state pensions. *See McKesson*, 496 U.S. at 40 (state may rectify discriminatory taxation either through refunds or retroactive taxation of the favored class).[23] Not only would this have trimmed Virginia's refund exposure by approximately $100 million, but imposing a tax on the pensions of the sixty thousand state retirees would have generated substantial additional reve-

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partment of Taxation's estimates are overinflated. *See, e.g.*, J.A. 25 (concluding that although only 134,000 returns indicated any federal pension income, because 43 percent of the returns were for married taxpayers, the total number of federal retirees "could be as many as 192,000."). For this to be so, however, each of the married taxpayers would have to have a spouse who also was a federal retiree. This seems unlikely.

[23] Had Virginia imposed a nondiscriminatory tax on state pensions before May 1, 1989, that would have effected a waiver of immunity under 4 U.S.C. § 111 and negated petitioners' claim for tax year 1988. Arguably, at that time Virginia could also have retroactively taxed all state pensions for 1987 as well, thus halving its refund exposure. *But see McKesson*, 496 U.S. at 39 (taxes imposed beyond grant of immunity must be refunded); *id.* at 40-41 n.23 (beyond some temporal limit, retroactive taxation is unconstitutional). Virginia elected not to follow that path, however, and it is too late for it to do so now.

nue. Presumably for sound political reasons, the General Assembly did not choose to pursue that course. But having chosen the refund route, and thus having eschewed the opportunity to limit its exposure while generating additional revenue, it cannot be heard to complain about the magnitude of the potential refund.

Similarly, the General Assembly's adoption of a special statute of limitations for bringing *Davis*-type claims undermines its equitable plea. Specifically, the General Assembly enacted a provision allowing federal retirees up to "one year from the entry of a final judicial order . . . resolving the issue of the application [of *Davis*] to Virginia income tax" within which to initiate their refund claims. Va. Code § 58.1-1823(B). In *McKesson*, 496 U.S. at 45 and 50, and again in *Beam*, 111 S.Ct. at 2248, this Court acknowledged that states may rely on procedural requirements, such as statutes of limitations, to reduce their exposure to refund claims. Yet by adopting this open-ended statute of limitations, the General Assembly has discarded what no doubt would have proven to be its most effective means of limiting its exposure. Having taken no steps to minimize its exposure (*i.e.*, retroactive equalization of the tax), but rather having taken affirmative steps to maximize it, the Department of Taxation cannot now be heard to argue that the size of the refund liability will have a "disruptive and destructive impact on [Virginia's] planning, budgeting, and delivery of essential services." Pet. App. 14a.

Perhaps the most troubling aspect of the Department of Taxation's equitable plea, however, is that it devolves to the assertion that if the potential refund is large, and money is tight, then the underlying conduct must be legal.[24] Thus, the Department of Taxation's perverse sug-

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[24] The Department of Taxation does not explain why the meager state of the fisc at the time the refund claims are litigated should provide a basis for denying relief altogether. It would seem that if

gestion is that the greater the size of the constitutional deprivation, the less the need to remedy it. But the law cannot be that whenever a state is low on cash it can take private property without being troubled by due process of law or just compensation; it cannot be that because the state needed more money (lest essential services be threatened), the taking is constitutional. By this logic, if a taxpayer is short on cash he owes no taxes; if a thief is poor, he takes only what is his.

Moreover, the Department of Taxation's bizzare standard is incapable of reasoned application: there is no gauge by which this Court, or any other court, can determine when a state's cost of complying with the Constitution becomes so great that the underlying deprivation must be deemed constitutional. For example, the court below relied on affidavits of state legislators and executive officers to hold that the estimated size of the refund "potentially" threatened the delivery of "essential state services." Pet. App. 14a. But surely it is not a proper function for the courts to determine which threatened services are essential, or how much of a reduction in funding available for such services is tolerable. Nor would it be proper for the Court to second-guess the legislature's determination to comply with *Davis*' mandate of equal treatment by exempting federal retirees from taxation, J.A. 28, rather than by extending the tax to state retirees, even though the latter course would likely have provided enough revenue to pay the refund liability.

Petitioners need not doubt that there may be no "easy choices," J.A. 37, or that Virginia's reputation for "providing a highly favorable climate for business and industry" may be tarnished if it has to raise taxes to pay

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the state is truly unable to pay for its unconstitutional actions, it must pay what it can, and the remainder when it can. It is a curious jurisprudence that hinges the constitutionality of a state's conduct on the vicissitudes of its budget.

refunds.[25] J.A. 49. But these are choices committed exclusively to legislative discretion; that they may be particularly distasteful or divisive does not alter the fact that courts are uniquely ill-equipped to make them. This Court cannot say whether Virginia should reevaluate the tax policy changes enacted in 1989 that reduced its revenues by $391.1 million (J.A. 28); nor may it simply accept Virginia's claim that because it adopted these policies it now has no revenue to pay the refunds. Rather, because these arguments are incapable of legal resolution, this Court cannot entertain them.

The Department of Taxation suggests that because it relied in good faith on a taxing scheme that had not been judicially challenged for almost half a century, it would be inequitable for it to have to refund some of the unconstitutional taxes it collected. Thus it faults petitioners for not having come forward sooner and saving it from its folly (and from collecting the billions of dollars of unconstitutional taxes imposed between 1942 and 1984). But petitioners' only duty was to pay their taxes, and, relying on Virginia's century-old refund statute, that they did. Virginia's legislators and executive officers had a different duty: to uphold and defend the Constitution of the United States. U.S. Const. Art. VI, cl. 3. Blaming their failure to fulfill this duty on petitioners is unjustified and undignified. More significantly, it provides no equitable justification for denying petitioners the refunds to which they are entitled.

For these reasons, petitioners submit that the Department of Taxation has no cognizable equitable claim to deny relief. Petitioners, many of whom are elderly and live on fixed incomes, are particularly incapable of bearing the unconstitutional burden the Department of Taxation has imposed upon them. As a matter of fundamental

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[25] To date, seven of the 23 states affected by *Davis*, Missouri, New Mexico, Michigan, Oregon, West Virginia, Louisiana and Colorado, which presumably faced similar choices, have paid refunds.

fairness, the Department of Taxation must refund petitioners' taxes.

IV. PETITIONERS ARE ENTITLED TO REFUNDS OF THE UNCONSTITUTIONAL TAXES THEY PAID ON THEIR FEDERAL PENSIONS

Perhaps in recognition of the infirmity of the lower court's choice of law holding, the Department of Taxation principally argues in its Brief in Opposition that petitioners are not entitled to relief even upon a retroactive application of *Davis*. Op. Cert. at 16-27. Thus, the Department of Taxation contends, even if *Davis* applies retroactively, "federal due process would not be violated by a restriction of relief to prospective invalidation of the tax." Op. Cert. at 18. This argument was explicitly rejected in *McKesson*:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no . . .

496 U.S. at 31. Accordingly, the Department of Taxation's remedial argument is no more availing than its choice of law argument. If petitioners are not entitled to relief under state law, then they are entitled to relief under the Constitution. This Court should so hold.

The central premise of the Department of Taxation's argument on this score is Justice Souter's observation in *Beam* that "[n]othing we say here deprives respondent of his opportunity to . . . demonstrate reliance interests entitled to consideration in determining the nature of the remedy [to be] provided . . ." 111 S. Ct. at 2448. Contending that *McKesson* applies only in cases "where it was entirely foreseeable at the time of enactment" that the tax would be invalidated (which supposedly this tax was not), Op. Cert. at 16, the Department of Taxation argues that this Court may do by remedy what it cannot by choice of law: relegate petitioners to prospective-only relief.

This argument completely misconceives the command of this Court's tandem holdings in *McKesson* and *American Trucking Ass'ns*. Foremost, *McKesson* reaffirmed this Court's long-standing precedent that

> [b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause.

496 U.S. at 36. In recognition of states' interest in financial stability, this Court sanctioned a departure from the "root requirement" of due process that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis original). But this departure was only temporal:

> To satisfy the requirements of the Due Process Clause, . . . the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligations, but also a "clear and certain remedy" for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

496 U.S. at 39, *quoting Atchinson T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). That is, in cases of unlawful taxation, the Constitution requires that taxpayers be afforded either a meaningful opportunity to prevent the imposition of the tax, or a post-deprivation remedy "designated to render the opportunity [to contest the tax] meaningful by preventing any permanent unlawful deprivation of property." 496 U.S. at 40.

The Department of Taxation contends that *McKesson's* requirement of an opportunity to "prevent[] any permanent unlawful deprivation of property" applies only "where it was entirely foreseeable" that the tax would be invalidated. Op. Cert. at 16. That is, it contends that

McKesson establishes the standard for "entirely foreseeable" invalidations of taxes, and *American Trucking Ass'ns* sets the standard for unforeseeable invalidations establishing "new principles of law." These cases, the Department of Taxation posits, stake out opposite ends of a continuum; in cases falling in between (presumably foreseeable but not entirely foreseeable invalidations of taxes), the constitutional entitlement to relief would similarly vary.[26]

In so arguing, the Department of Taxation misreads *McKesson* and *American Trucking Ass'ns*. These cases establish a binary choice: either the tax is unconstitutional, in which case "meaningful backward-looking relief" is required, *McKesson*, 496 U.S. at 31, or it is not, in which case due process is not implicated and prospective invalidation of the tax is sufficient. *American Trucking Ass'ns*, 496 U.S. at 181-82. As the Court held in *American Trucking Ass'ns*,

> Our decision today in *McKesson* makes clear that once a State's tax statute is held invalid . . ., the State is obligated to provide relief consistent with due process principles. When the State comes under such a constitutional obligation, equitable considerations play only the most limited role in delineating the scope of that relief.

496 U.S. at 181, citations omitted. *See also id.*, 496 U.S. at 184 ("As previously discussed, *McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found.").[27]

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[26] Inexplicably, the Department of Taxation contends that the appropriate relief in a case that falls between establishing "a new principle of law" and being "entirely foreseeable" is the same relief required when, by reason of prospective decisionmaking, there is no constitutional deprivation: "restriction of relief to prospective invalidation of the tax." Op. Cert. at 18.

[27] *See also McKesson*, 496 U.S. at 31 n.15 (constitutional entitlement to relief arises when decision "rest[s] on established principles;" *i.e.*, there is no "new principle of law.").

Moreover, the sole "equitable consideration" the Department of Taxation presses is the cost of complying with its constitutional obligation to pay refunds. But the Court in *McKesson* dismissed the contention that the cost of refunds was a relevant consideration:

> We reject respondent's intimation that the cost of any refund considered by the State might justify a decision to withhold it. Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or money useful, so also Florida cannot object to a refund just because it has other ideas about how to spend the funds.

496 U.S. at 51 n.35. *See also id.*, at 50 ("the State's interest in financial stability does not justify a refusal to provide relief.").

For these reasons, the Department of Taxation errs in reading *Beam*'s sanctioning of "reliance interests entitled to consideration in determining the nature of the relief *that must be provided*," 111 S.Ct. at 2448 (emphasis added), as allowing for less than full backward-looking relief. Rather, the "matter with which *McKesson* did not deal," *id.*, was the extent to which the state's interests "shap[ed] the contours of the relief that the State must provide to illegally or erroneously deprived taxpayers;" *i.e.*, the choice between full refunds, partial refunds and partial retroactive taxation of the favored class, and full retroactive taxation. *McKesson*, 496 U.S. at 50.

But this inquiry is irrelevant here as refunds are the only permissible remedy. Foremost, *McKesson* merely states the minimum relief constitutionally required: "[t]he State is free, of course, to provide broader relief as a matter of state law than is required by the federal Constitution." *McKesson*, 496 U.S. at 52 n.36. By adopting a tax refund statute, Virginia has done just that. Accordingly, even if the Constitution might permit some

form of retroactive taxation of the favored class in lieu of refunds, Virginia's statute does not. *See* Va. Code §§ 58.1-1820 - 58.1-1826. Moreover, because the discriminatory tax imposed here was beyond the statutory grant of immunity of 4 U.S.C. § 111, the tax "was beyond the State's power to impose" and accordingly Virginia would have "no choice but to 'undo' the unlawful deprivation by refunding the tax." *McKesson*, 496 U.S. at 39. *See also Moses Lake Homes, Inc. v. Grant County*, 365 U.S. at 752. Finally, while a different question might have been posed had Virginia immediately attempted to equalize the discrimination by retroactively taxing the favored class, any effort to do so now would plainly be so belated "as to transgress the constitutional limitation." *McKesson*, 496 U.S. at 40 n.23, *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938).

For these reasons, petitioners submit that they are entitled to refunds of the taxes Virginia unconstitutionally imposed on their federal pensions. The court below held that Virginia's refund statute did not entitle petitioners to relief "because the *Davis* decision is not to be applied retroactively." Pet. App. at 15a.[28] Because *Davis* must be applied retroactively, however, Virginia's refund statute is controlling and petitioners are entitled to relief thereunder. Yet even if Virginia's statute did not accord petitioners this relief, they would be constitutionally entitled to "meaningful backward-looking relief," which, in this case, must mean refunds of the taxes unconstitutionally imposed on their federal pensions.

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[28] The court below also held that under its own retroactivity jurisprudence petitioners were not entitled to relief. Pet. App. at 15a-16a. As noted in *American Trucking Ass'ns*, however, "[i]n order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions." 496 U.S. at 178. Accordingly, this basis for denying relief is untenable.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Virginia denying petitioners refunds of taxes imposed on their federal pensions must be reversed with instructions to grant petitioners' refunds.

Respectfully submitted,

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